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In The

Supreme Court of the United States

October Term, 1982

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL,

Petitioners,

vs.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL AND GREGORY R. ANRIG, COMMISSIONER OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Judicial Court for the Commonwealth of Massachusetts

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QUESTIONS PRESENTED

1. Whether it is necessary for the State to prove that no less drastic means exists for implementing a reporting statute against a church school, such statute requiring private schools to report names, ages and residences of children in attendance to Massachusetts school authorities, where it is claimed that as applied the statute violates the right to religious and associational freedoms as guaranteed by the First and Fourteenth Amendments to the U. S. Constitution.

2. Whether the granting of summary judgment is improper where (a) bona fide constitutional claims involving First Amendment freedoms exist, and (b) an indefinite and inadequate factual foundation hinders a full exploration of such claims, a ruling on which could affect many others in a similar position.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in the above-entitled case on June 2, 1982.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Attorney General v. Robert W. Bailey*, is printed in Appendix A hereto, at APP. 1, *infra*, and is reported at 386 Mass. 367 (1982). The opinion of the Superior Court of Suffolk County, Massachusetts is unreported but is printed in Appendix B hereto, *infra*, at APP. 22.

JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts (Appendix A, *infra*, at APP. 1) was entered on June 2, 1982. The jurisdiction of the Supreme Court is invoked under 28 U. S. C. § 1257 (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Annotated Laws of Massachusetts and the United States Constitution are involved in the questions presented:

Annotated Laws of Massachusetts

G.L. c.72, § 2. REGISTRATION OF CERTAIN MINORS; PRIVATE SCHOOL TO REPORT CERTAIN ENROLLMENTS, ETC.

The school committee of each town shall ascertain and record the names, ages and such other information as may be required by the department of

education, of all minors residing therein between five and sixteen, and of all minors over sixteen who do not meet the requirements for the completion of the sixth grade of the public schools of the town where he resides. The school committee of each town shall also ascertain the number of pupils, regardless of age, whose parents or guardians are residents of the town and who are enrolled for full-time attendance, in kindergarten and grades up to and including grade twelve, in public and vocational schools and classes in the commonwealth and nonpublic schools anywhere. Whoever, in control of any such minor, withholds information sought by a school committee or its agents under this section or makes a false statement relative thereto, shall be punished by a fine of not more than fifty dollars. Supervisors of attendance, under the direction of the committee and superintendent of schools, shall have charge of the records required by this section, shall be responsible for their completeness and accuracy, and shall receive the co-operation of principals, teachers and supervisory officers in the discharge of their duties hereunder. A card, as prescribed by the department, shall be kept for every child whose name is recorded hereunder. Supervisors of attendance shall compare the names of children enrolled in the public and private schools with names of those recorded as required herein, and examine carefully into all cases where children of school age are not enrolled in, and attending school, as required by section one of chapter seventy-six.

The annual school committee report shall set forth the number of children recorded as herein required, classified by ages, together with the number attending public or private schools, and the number not attending school, in any given year.

The supervisory officers of all private schools shall, within thirty days after the enrollment or registration of any child of compulsory school age, report his name, age and residence to the superintendent of

schools of the town where the child resides; and whenever a child withdraws from a private school, such officers shall, within ten days, notify said superintendent.

United States Constitution

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Attorney General of the Commonwealth of Massachusetts and the Commissioner of Education, respondents herein, seek to enforce the provisions of G.L. c.72, §2, a school reporting statute, against the petitioners, Rev. Robert W. Bailey and Rev. Stephen M. Willett, pastor and associate pastor respectively of Grace Bible Church of Dracut, Massachusetts. G.L. c.72, § 2 requires the supervisory officers of public and private schools to report annually the name, age and residence of each child of compulsory school age in attendance. Grace Bible

Church is a non-denominational, independent and fundamentalist Church, the membership of which recognizes the Holy Bible as the "inspired and inerrant Word of God." The Church operates all ministries in observance of biblical commands and for the ultimate purpose of spreading the "Good News" in the manner in which "salvation is obtained." Grace Bible Church Christian School, established in September of 1980, is believed by petitioners to be a ministry of the Church in similar manner to the Sunday worship service, Sunday school, and Bible study classes. Further, the church school is believed to be an integral and inseparable part of the Church, not existing as a distinct entity apart therefrom.

Grace Bible Church Christian School provides full time instruction, Monday through Friday, in reading, writing, spelling, history, mathematics, science, geography, language, poetry, art, physical education, physics and the Bible to children in grades one through six. It is a totally Christian curriculum, which is utilized by thousands of church schools throughout the nation, permeated with Biblical verse and truth, and taught entirely from a Christian perspective. As a matter of firm religious conviction the Grace Bible Church can neither seek nor accept approval or funding for its church school from any government agency, state or federal.

In October of 1980, the school committee for the town of Dracut demanded compliance by Grace Bible Church Christian School with the reporting requirements of G.L. c.72, § 2 through Rev. Bailey and Rev. Willett. Upon petitioners' refusal to comply, for what they cited as reasons of firm religious objection thereto, respondents brought the within action for declaratory judgment and

injunctive relief. Petitioners raised the federal questions of concern herein in their Answer to the Complaint as follows:

SECOND DEFENSE

Application of the statutes as cited in the Complaint to Defendants will violate the rights of defendants and children and parents of children enrolled in Grace Bible Church Christian School to the free exercise of religion under the First Amendment of the Constitution of the United States.

THIRD DEFENSE

Application of the statutes as cited in the Complaint to Defendants will violate the rights of the defendants and children and parents of children enrolled in Grace Bible Church Christian School to be free from the Establishment of Religion under the First Amendment of the Constitution of the United States.

FIFTH DEFENSE

Application of the statutes as cited in the Complaint to Defendants will violate the rights of Defendants and children and parents of children enrolled in Grace Bible Church Christian School to freedom of association under the Constitution of the United States.

Respondents moved for summary judgment based on Rule 56 of the Massachusetts Rules of Civil Procedure, contending that no genuine issue of material fact exists and that they were entitled to judgment as a matter of law. Accompanying the motion were the affidavits of the chairman of the school committee and superintendent for the town of Dracut as well as that of legal counsel. The affidavits stated, *inter alia*, the duties of the school committee under G.L. c.72, § 2; the application of such report-

ing statute to Grace Bible Church Christian School; and the latter's refusal to comply. The petitioners responded with the affidavits of Bailey and Willett explaining the religious beliefs of Grace Bible Church, the biblically mandated ministerial characteristics of the church school, and their firm religious conviction against the necessary prior approval of their educational ministry by any civil government.

Subsequent to a hearing consisting of oral argument by counsel only, the Superior Court of Suffolk County granted summary judgment to the Attorney General and Commissioner, addressing the federal questions presented herein as follows:

> Upon consideration of the complaint, defendants' answer and the admissions therein, affidavits, memoranda and oral argument of the parties, it is my considered judgment that there is no genuine issue as to any material fact and the plaintiffs as the moving parties are entitled to a judgment as a matter of law.
>
> The position of the defendants in contesting the constitutionality of the statutes and regulations referred to *supra* is without merit as stated previously herein. I rule that the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the defendants may have in refusing to disclose the information requested.

APP. 34. Rev. Bailey and Rev. Willett filed Notice of Appeal to the Appeals Court. The Supreme Judicial Court of Massachusetts granted respondents' application for Direct Appellate Review. In the Brief of Appellants, petitioners raised federal questions in the "Issues Presented For Review":

4. Did the lower court err in not utilizing the three-prong test as enumerated by the U. S. Supreme Court in the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder* in construing the application of G.L. c.72, § 2 to Rev. Bailey and Rev. Willett in light of the protections afforded them by the religion clauses of the First Amendment?

5. Upon consideration of the evidence in support of and in opposition to the Commonwealth's Motion for Summary Judgment, did the lower court err in holding that the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the appellants have in refusing to disclose the information requested under G.L. c.72, § 2?

On June 2, 1982, the Supreme Judicial Court affirmed the lower court's holding as follows:

a. Free exercise

* * *

Because of the importance of education in our society, we believe that the State's need for the required information outweighs the incidental burden on the right of the defendants, parents, and children to practice their religion.

b. Establishment clause

* * *

We, therefore, conclude that the judge correctly determined as a matter of law that the application of G.L. c.72, § 2, to the Grace Bible Church Christian School does not violate the establishment clause of the First Amendment.

c. Freedom of association

* * *

In this case, the judge correctly determined as a matter of law that the State's interest in compulsory education is so compelling and the information

sought so relevant that it justifies the burden on the defendants', the parents', and the childrens' right to freedom of association.

• • •

Thus, we conclude that on the very narrow issue of the constitutionality of the reporting requirement, the judge properly granted the plaintiffs' motion for summary judgment.

APP. 21. It is from this ruling that petitioners pray a writ of certiorari issue.

REASONS FOR GRANTING WRIT

1. Certiorari should be granted to decide important questions as to the burden, if any, on the state to show that no less drastic means exist to fulfill state interests when First Amendment Rights are violated.

In the *Bailey* opinion herein, the Supreme Judicial Court of Massachusetts rendered a decision by way of summary proceedings on issues not heretofore addressed by this Court. The court ruled that the state's interest in statutorily requiring church schools unapproved by the state to report names, ages and residences of attendees overrides any violation of religious and associational freedoms. However, petitioners submit that this ruling was made in a manner generally inconsistent with the tests developed through successive precedent by this Court when faced with a consideration of First Amendment claims. Further, it is noted that a recent decision by this Court which will be discussed *infra*, implies a change in the standards utilized by courts in analyzing such claims,

a change for which Rev. Bailey and Rev. Willett seek, among other things, clarification by way of this petition.

a. Freedom of Association

The petitioners submit that the reporting requirements of G.L. c.72, § 2 will have a chilling effect on their religious associational rights as well as those of the parents and children connected with Grace Bible Church Christian School.[1] Parents such as Andre Paquette, Sr., whose affidavit was one of those offered in opposition to respondents' summary judgment motion, might well be deterred from sending their children to the church school for fear of fines or even truancy prosecutions. G.L. c.76, § 2 (fine of $20.00); G.L. c.76, § 4 (fine of $200.00 for inducing child to be absent from school). They are hindered in fulfilling a religious mandate to educate their children under a totally Christian perspective, under which they believe can only be obtained at Grace Bible Church Christian School.

In *NAACP v. Alabama, supra,* this Court ruled that the "freedom to engage in association" is a "'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 451, 460. In the case at bar, the *Bailey* court recognized that the reporting requirements of G.L. c.72, § 2 had "adverse consequences" on the religious associational rights of the petitioners as well as those of the parents and children associated with the church school. APP. 17.

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[1]Petitioners have standing to raise the associational claims on behalf of such parents and children. *See, NAACP v. Alabama,* 357 U. S. 449, 458-460 (1958).

However, the court erred when, relying predominantly on *NAACP v. Alabama,* it ruled that such infringement was justified in that the "information sought" was "so relevant" to the goal of compulsory education. APP. 18. Relevance petitioners submit, is an inappropriate constitutional standard. In *Shelton v. Tucker,* 364 U.S. 479 (1960), this Court struck down on the grounds of associational freedom, a statute requiring teachers of state-supported schools to disclose all organizational ties. Although it was found that "no question" existed as to "the relevance of a State's inquiry into the fitness and competence of its teachers," the matter did not rest there. *Id.* at 485. It was further determined that any associational abridgement on such teachers "must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 489. In the cause herein, respondents' compelling interest in compulsory education is acknowledged. But the court erred in failing to compel respondents to show proof that no less drastic means is available for fulfilling the purposes of G.L. c.72, § 2 as to Rev. Bailey and Rev. Willett.

b. Free Exercise of Religion

As in the case of associational freedom, this Court has likewise applied the less drastic means analysis to claims of free exercise of religion. Beginning with the Court's ruling in *Sherbert v. Verner,* 374 U.S. 398, 406, 407 (1963) (alleged abuse of the unemployment compensation fund) and continuing with *Wisconsin v. Yoder,* 406 U.S. 205, 215, 218, 221 (1972) (alleged violation of compulsory school attendance laws by Amish) and recently *Thomas v. Review Board of Indiana Employment Secur-*

ity Division, 450 U.S. 707, 718 (1981), it has been consistently held that upon the demonstration of a sincerely-held religious belief the free exercise of which is burdened by some statutory requirement, the state must not only show a compelling interest which justifies the infringement but also that no less restrictive alternative means of satisfying that interest exists.

In the cause herein, the court erred in ruling that the application of G.L. c.72, § 2 to the petitioners "has only an incidental burden" on their "right to practice their religion." APP. 11. The demand on petitioners by the Commonwealth for the names, ages and addresses of children attending the church school ministry of Grace Bible Church, of which Rev. Bailey and Rev. Willett are pastors, directly interferes with the Church's religious autonomy. Petitioners submit that this amounts to an "undue" burden which respondents must avoid by some less drastic means if available. *Yoder, supra*, at 220.

c. Less Drastic Means

A review of the record reveals no attempt on the part of the Attorney General or Commissioner of Education "to demonstrate that no alternative forms of regulation would (further the compelling state interest) without infringing upon the First Amendment rights" of Rev. Bailey and Rev. Willett as well as all those connected with the church school. *Sherbert, supra*, at 407. Respondents cannot rest on assertions made in unverified pleadings, briefs, or oral argument of counsel to prove the absence of alternative forms of regulation. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968). The record does show by implication that less drastic

alternatives do exist: the petitioners in the proceedings below offered an uncontroverted affidavit showing that the authorities were able to locate parents who were in alleged violation of the compulsory education law without recourse to the G.L. c.72, § 2 reporting requirements. *See*, affidavit of Andre Pacquette. Moreover, the Court can take judicial notice of the statutory requirement in Massachusetts that annual surveys be made of the residents of all cities and towns who are three years of age or older. G.L. c.51, § 4. Once these names are collected, as they are every year, the local school committee can easily compare them with reports from approved schools to determine who is in compliance with the compulsory education law.

Alternatively, the responsibility for providing the information required under G.L. c.72, § 2 could be placed with the parents themselves either in their individual capacities or through a parent organization established and administered outside the jurisdiction of the Church.

d. The Implications of U.S. v. Lee.

The recent decision of *U.S. v. Lee*, — U.S. —, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) raises important questions not heretofore addressed by this Court concerning the relevance of the less drastic means test in cases such as the case at bar involving First Amendment claims. As applied to the cause herein, if *Lee* modifies or eliminates the test, then the Attorney General and the Commissioner of Education will have been justified in remaining silent on the existence of any alternative means of fulfilling the requirements of G.L. c.72, § 2 as to the children in attendance at Grace Bible Church Christian School despite the

burdens placed on the free exercise and religious associational rights of the petitioners, parents and children.[2]

In *Lee*, a self-employed farmer of the Old Order Amish faith claimed that withholding social security taxes from his employees or paying employer's share of such taxes violated his religious faith. 71 L. Ed. 2d at 127. In its analysis of Mr. Lee's constitutional claim, this Court utilized the first and second tier of the three part test found in *Thomas*, *Yoder*, and *Sherbert*, *supra*, holding that while the social security system interferes with the free exercise of Amish belief "(t)he state may justify a limitation on religious liberty by showing . . . an overriding governmental interest." *Id.* at 132. It was found that the government's interest in "mandatory and continuous participation in and contribution to the social security system is very high." *Id.* at 133. However, this court did not discuss the burden on the state to show that no less drastic means was available. Rather, the "remaining inquiry" by the Court was "whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest." *Id.* at 133. Because this could potentially impose a lesser burden of proof on the State when First Amendment claims are raised against the enforcement of a statute such as G.L. c.72, § 2 herein, it is important that this Court clarify the role if any, of the less drastic means test in regard to such claims.

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[2]Petitioners note that although the *Bailey* court did not rely explicitly on the rationale in nor cite *Lee*, its ruling on the constitutional claims herein is analogous. Further, respondents made the court aware of *Lee* before the *Bailey* decision was rendered.

In contrast to the test in *Thomas, Yoder* and *Sherbert, supra,* where the state was required to show that no less drastic means were available to accomplish a compelling interest, the state under the *Lee* rationale would only be required to show that "accommodating" the constitutional claim will "unduly interfere" with the state's compelling interest. The state's interest, rather than the rights guaranteed and protected by the First and Fourteenth Amendments, would be in a preferred position or an assumed standpoint of priority.

Thus, in the cause herein, the fact that, as discussed *supra,* a viable alternative is available (utilization of the Massachusetts annual surveys or parental organizations) would be rendered irrelevant. The Commonwealth would need only argue that petitioners' First Amendment claims "unduly interfere" with the reporting requirements of G.L. c.72, § 2.

As early as *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940) this Court declared that the state's "power to regulate" in the area of protected freedoms "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedoms." Petitioners believe that this rule of law continues to apply to claims of infringement on free exercise and religious association. Moreover, petitioners submit that factors unique to the issues in *Lee* distinguish its analysis from the cause herein. Among other things, *Lee* dealt with: a "commercial" activity ongoing in the business marketplace as opposed to a church ministry; taxation as opposed to reporting requirements; and a nationwide benefits system (social security) as opposed to a

statewide aid in purportedly fulfilling compulsory education laws. It is important that this Court clarify by way of granting the writ herein, whether the treatment accorded First Amendment claims by the *Bailey* court is the appropriate standard of review and whether this court has modified the less drastic means test by its decision in *U. S. v. Lee*.

2. Certiorari should be granted to decide important questions concerning the appropriateness of summary judgment in cases involving First Amendment claims.

The *Bailey* opinion presents important questions not heretofore addressed by this Court concerning the role, if any, that summary proceedings play when the party opposing the motion makes claims of interference by the state with First Amendment freedoms. Rev. Bailey and Rev. Willett submit that the Court erred in affirming the granting of summary judgment. Not only are there genuine issues of material fact remaining for further evidentiary proceeding, but because petitioners present bona fide First Amendment claims, which could affect many others in the Commonwealth of Massachusetts holding similar beliefs and positions, the cause herein should have, at the very least, been remanded to the lower court for amplification of the record. Thereupon, petitioners' claims could have been more closely scrutinized.

This Court has long held that when considering the evidence in support of and in opposition to a motion for summary judgment, the court is under a duty to view such evidence most strongly in favor of the party opposing the

motion, giving that party the benefit of all reasonable inferences. *U. S. v. Diebold*, 369 U. S. 654, 655 (1962). However, when such opposing party presents constitutional claims or defenses, the duty of the Court, as discussed below, is more stringent.

On the basis of the pleadings, seven cursory affidavits, exhibits and oral argument of counsel, the *Bailey* court affirmed the granting of summary judgment in favor of the Attorney General and the Commissioner of Education. In summary fashion, the court ruled that the infringement upon the free exercise and religious associational rights of Rev. Bailey, Rev. Willett and the parents and children connected with Grace Bible Church Christian School is overridden by the respondents' interest in the reporting requirements of G. L. c. 72, § 2. This was error.

Kennedy v. Silas Mason Co., 334 U. S. 249, 251, 256 (1948) involved the application of the overtime provisions of the Fair Labor Standards Act to certain persons who worked in a government-owned plant producing munitions. This Court acknowledged therein that when a decision on an issue could potentially affect the rights of many others (in that case other workers), "(n)o conclusion in such a case should prudently be rested on an indefinite factual foundation." In the cause herein, the ruling in *Bailey* on the petitioners' constitutional claims will have a potentially adverse effect on other church schools located in Massachusetts which hold or represent beliefs similar to those found at Grace Bible Church Christian School.[3]

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[3]Petitioners are aware of at least two other cases now pending in Massachusetts brought by the Attorney General

(Continued on following page)

The case of *Perry v. Sinderman*, 408 U. S. 593 (1972) is also pertinent. This Court ruled that where bona fide constitutional claims exist (in that case, the right of a professor to publicly criticize policies of the college administration), summary judgment is improper "without full exploration of the issue." Id. at 595, 598. Not only did the cause herein present "bona fide" First Amendment claims, but genuine questions of material fact which have yet to be addressed at a hearing on the merits. A review of the record shows that it is replete with instances where, upon the affidavits in support of and in opposition to the respondents' summary judgment motion, the lower court either resolved questions of material fact or brought into question the truth or falsity of the religious beliefs petitioners. This was error. *U. S. v. Diebold, supra; see, U. S. v. Ballard*, 322 U. S. 78 (1943) (the truth or falsity of a religious stance is not subject to examination.) Perhaps the most striking example of a material question involves the availability of less drastic means by which the Commonwealth can obtain the information sought under G.L. c.72, § 2 while at the same time not infringing upon the free exercise and associational rights of Rev. Bailey and Rev. Willett. As stated above, the respondents never even properly addressed this matter. *See, First National Bank of Arizona, supra.* Therefore, neither was there a definite factual foundation as called

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against church schools of a like religious persuasion to those found herein. *Francis X. Bellotti, et al. v. Lamar Breazeale*, Civil Action No. 47822, Suffolk County Superior Court (filed 1981) and *Francis X. Bellotti v. Temple Christian Academy and Reverend Bruce Turner*, Civil Action No. 47821, Suffolk County Superior Court (filed April 29, 1981).

for in *Kennedy, supra,* nor were all the relevant issues "fully explored." For the foregoing reasons it was improper for the *Bailey* court to affirm the granting of summary judgment in favor of respondents.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court for the Commonwealth,

At Boston, June 2, 1982.

In the Case No. SJC-2635

ATTORNEY GENERAL & another

vs.

ROBERT W. BAILEY & another

pending in the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT for the County of SUFFOLK, No. 45660.

ORDERED, that the following entry be made in the docket; viz.,—

Judgment affirmed.

BY THE COURT
/s/ Patrick J. Hurley, Clerk.

June 2, 1982
See opinion on file.

ATTORNEY GENERAL & another[1] vs. ROBERT W. BAILEY[2] & another.[3]

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[1]Commissioner of Education.

[2]Pastor of the Grace Bible Church in his capacity as a supervisory officer of the Grace Bible Church Christian School.

[3]Steven M. Willett, associate pastor of the Grace Bible Church, in his capacity as a supervisory officer of the Grace Bible Church Christian School.

ABRAMS, J. We granted the plaintiffs' application for direct appellate review to resolve two narrow questions: whether G. L. c. 72, § 2, requires nonapproved private schools, run under religious auspices, to report the names, ages, and residences of the children in attendance; and, if so, whether this requirement violates the right to religious freedom, freedom of association, and privacy, guaranteed by the First and Fourth Amendments to the United States Constitution.[4] We hold that the reporting requirement of G. L. c. 72, § 2, applies to all private schools, approved and nonapproved, religious and secular. In addition, the application of this requirement to schools run by religious organizations is constitutional.

We summarize the facts. Since September, 1980, the Grace Bible Church has operated the Grace Bible Church Christian School in Dracut, to provide a Christian education for students in grades one through six. Reverend Robert W. Bailey is the pastor of the church. Reverend Steven M. Willett is the associate pastor of the church and administrator of the school. They are also the officers, directors, and incorporators of the church.

On October 7, 1980, the school committee of Dracut requested the names and addresses of all the Dracut resident children who attend the Grace Bible Church Christian School. In a letter, dated October 16, 1980, the defendants'

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[4]This case does not raise the issue of the constitutionality of standards for approving private schools, curriculum requirements, or the qualifications of private school teachers. We do not consider these issues, and we intimate no view on them.

The defendants do not argue that our State Constitution provides greater protection than the United States Constitution. Thus, we do not consider any issues of State constitutional law.

attorney notified the school committee that the Grace Bible Church Christian School would be unable to comply with their request. The office of the Attorney General, by letter dated November 13, 1980, asked Reverend Bailey to comply with the school committee's request. On November 18, 1980, the defendants' attorney replied that since the Grace Bible Church Christian School is a church school, it is not subject to the reporting provisions of G. L. c. 72, § 2. In addition, the defendants' attorney argued that 603 Code Mass. Regs. §§ 19.01-19.05 (1979), violated the privacy of United States citizens and the sanctity of the church.[5]

After receiving this reply, the Attorney General and the Commissioner of Education brought this action in the Superior Court to obtain compliance with the private school reporting provisions of G. L. c. 72, § 2. They sought a declaration that Reverend Bailey and Reverend Willett, as supervisory officers of the Grace Bible Church Christian School, are required to report to the superintendent of schools of the town the name, age, and residence of every child who attends that school. Before trial, the plaintiffs moved for summary judgment, claiming that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. After a hearing at which the Reverends Bailey and Willett submitted affidavits in opposition to the plaintiffs' motion, the judge ruled that there were no genuine issues of material fact.

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[5]Under 603 Code Mass. Regs. §§ 19.01-19.05 (1979), school committees are required to collect, maintain, and transmit to the Department of Education information pertaining to each person in the Commonwealth between the ages of three and twenty-one years.

Consequently, the judge granted the plaintiffs' motion for summary judgment, declared that "the Commonwealth's interest [in compulsory education] is of sufficient magnitude to override whatever constitutional interest the defendants may have in refusing to disclose the information requested," and ordered the defendants to comply with G. L. c. 72, § 2. The defendants appealed. We affirm.

1. Summary Judgment.

Rule 56 (c) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974), provides that a judge shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, the court does not "pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts." *Hub Assocs. v. Goode*, 357 Mass. 449, 451 (1970), quoting *Gordon v. American Tankers Corp.*, 286 Mass. 349, 353 (1934). A court should not grant a party's motion for summary judgment "merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." *Hayden v. First Nat'l Bank*, 595 F. 2d 994, 997 (5th Cir. 1979), quoting 10 C. A. Wright & A. R. Miller, Federal Practice and Procedure § 2725, at 514 (1973). Instead, the court should only "determine whether a genuine issue of material fact exist[s]." *H & M Cake*

Box, Inc. v. Bakery & Confectionery Workers, Int'l Union, Local 45, 454 F. 2d 716, 719 (1st Cir. 1972).

When the court considers the materials accompanying a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *Hub Assocs. v. Goode*, 357 Mass. 441, 451 (1970), quoting *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962). "Also, all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." *Gross v. Southern Ry.*, 414 F. 2d 292, 297 (5th Cir. 1969). "[T]he moving party must affirmatively show that there is no real issue of fact." *Hub Assocs. v. Goode, supra.* Indeed, "[a] party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings. This is so even though . . . he would have no burden if the case were to go to trial." *Mack v. Cape Elizabeth School Bd.*, 553 F. 2d 720, 722 (1st Cir. 1977). See *Felix v. Young*, 536 F. 2d 1126, 1134-1135 (6th Cir. 1976).

Relying on these principles, the defendants claim that the judge erred in granting the plaintiffs' motion for summary judgment because there are genuine issues of material fact. We do not agree.

2. Statutory Arguments as to the Applicability of G.L. c.72, § 2, to Grace Bible Church Christian School.

a. *Grace Bible Church Christian School is a school subject to the reporting requirement of G. L. c. 72, § 2.* The

defendants claim that their affidavits, denying that the Grace Bible Church Christian School is a "school," raise genuine issues of material fact which cannot be decided on a motion for summary judgment. On this record, we think that the issue whether the Grace Bible Church Christian School is a "school" within the meaning of G.L. c.72, § 2, is a question of law, and thus is a proper subject for a motion for summary judgment.

General Laws c.72, § 2, as amended by St. 1966, c.14, § 62, requires "[t]he school committee of each town [to] ascertain the number of pupils . . . whose parents or guardians are residents of the town and who are enrolled for full-time attendance, in kindergarten and grades up to and including grade twelve, in public and vocational schools and classes in the commonwealth and nonpublic schools anywhere." To enable school committees to carry out this duty, G.L. c.72, § 2, mandates that "[t]he supervisory officers of all private schools shall, within thirty days after the enrollment or registration of any child of compulsory school age, report his name, age and residence to the superintendent of schools of the town where the child resides. . . ."

Grace Bible Church Christian School provides full time instruction in reading, writing, spelling, history, mathematics, science, geography, language, poetry, art, physical education, phonics, and the Bible, to children in grades one through six. The stated educational goals of the school include teaching children "[t]o develop creative skills for communication, and mathematical skills; [t]o develop critical thinking and intellectual integrity; and [t]o train latent abilities, intellectual or physical." "In its ordinary meaning, the word 'school' denotes a place

for systematic instruction in any branch or branches of knowledge. . . . '[I]t means a place where systematic instruction in any or all of the useful branches of learning is given by methods common to schools and institutions of learning.'" *Chicopee v. Jakubowski*, 348 Mass. 230, 232 (1964), quoting *Kesselring v. Bonnycastle Club, Inc.*, 299 Ky. 585, 589 (1929). Thus, we believe that the Grace Bible Church Christian School is a "school" within the meaning of G.L. c.72, § 2.[6]

Our conclusion is consistent with the purpose of G.L. c.72, § 2. General Laws c.72, § 2, was intended to facilitate the enforcement of the compulsory attendance law. G.L. c.76, § 1. Under G.L. c.76, § 1, school committees approve those private schools which a child may attend to satisfy the compulsory attendance law.[7] A child may satisfy the

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[6]General Laws c. 72, § 2, distinguishes between public schools and no ublic or private schools. The public schools include all schools from those lower than grammar schools to those commonly known as high schools established and maintained as part of the system of popular education. *Jenkins v. Andover*, 103 Mass. 94, 97-98 (1869). See *Commonwealth v. Connecticut Valley St. Ry.*, 196 Mass. 309, 311-312 (1907). Private schools are schools of the same type which are supported and maintained by individuals. *Id.* at 313. *Jenkins v. Andover, supra.* It is undisputed that the Grace Bible Church Christian School is operated under the supervision of the board of elders of the Grace Bible Church, and not the town of Dracut, and is therefore a private school, subject to the reporting requirement of G. L. c. 72, § 2.

[7]In pertinent part, G. L. c. 76, § 1, as amended through St. 1972, c. 766, § 12, provides that "school committees shall approve a private school when satisfied that the instruction . . . required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools . . . but shall not withhold such approval on account of religious training."

compulsory attendance law by attending a school run under religious auspices. To determine which children are complying with the compulsory attendance law, the school committee must identify all children attending private schools, both secular and religious. We believe that the Legislature intended the reporting requirement of G.L. c.72, § 2, to apply to all private schools, including those run by religious organizations. Thus, the Grace Bible Church Christian School is not immunized from the reporting requirement of G.L. c.72, § 2, because it is run under the supervision of the board of elders of the Grace Bible Church.

In addition, we believe that G.L. c.72, § 2, applies to all private schools whether or not they have been approved. To ascertain which children are in compliance with G.L. c.76, § 1, the school committee must know the names of all children who are attending private schools, approved and nonapproved. Although the Grace Bible Church Christian School has not been approved, see G.L. c.76, § 1, it is subject to the reporting requirement of G.L. c.72, § 2.

b. *The defendants are persons required to report.* Under G.L. c.72, § 2, it is the "supervisory officers" of the school who have the duty to report the name, age, and residence of every child of compulsory school age in attendance. The role of a supervisory officers is "to oversee, to have oversight of, to superintend the execution of or performance of (a thing), or the movements or work of (a person); to inspect with authority; to inspect and direct the work of others." *Fluet v. McCabe,* 299 Mass. 173, 179 (1938). See Webster's Int'l Dictionary 2533 (2d ed. 1959). Reverend Willett is the administrator of the

school. As an "administrator," he "direct[s] or superintend[s] the execution, application or conduct of" the school. See Webster's Int'l Dictionary 34 (2d ed. 1959). Thus, we believe that there are no genuine issues of material fact concerning Reverend Willett's position as a "supervisory officer" within the meaning of G.L. c.72, § 2.

In addition, Reverend Bailey is an incorporator, director, officer, and pastor of the church. In his affidavit, Reverend Bailey stated that the school was part of the church. Since Reverend Bailey is a leader of the church, we see no genuine issues of material fact concerning his status as a "supervisory officer" within the meaning of G.L. c.72, § 2.

3. Constitutional Issues.

The defendants claim that the judge erred in granting the plaintiffs' motion for summary judgment because there are genuine issues of material fact relating to the constitutionality of G.L. c.72, § 2, as applied under the First and Fourth Amendments to the United States Constitution. We conclude that there are no genuine issues of material fact on this constitutional question. The only issues are issues of law. Thus, the judge properly decided these issues on a motion for summary judgment. See *Consolidated Cigar Corp. v. Department of Pub. Health,* 372 Mass. 844, 845-846 (1977).

a. *Free exercise.* The defendants claim that G.L. c.72, § 2, requires the release of information pertaining to the school, a ministry of the church. The defendants assert that to require the disclosure of church information necessarily violates the free exercise clause of the First Amendment to the United States Constitution.

The free exercise clause embraces two separate concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). See *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *Reynolds v. United States*, 98 U.S. 145, 164 (1878). The application of G.L. c.72, § 2, to the Grace Bible Church Christian School does not affect the right of the defendants, the children enrolled in the school, or their parents to maintain their beliefs. General Laws c.72, § 2, therefore, is a law that regulates conduct.

To determine whether a law that regulates conduct violates the free exercise clause, a court must apply a three-pronged test. A court must determine (1) whether the activity interfered with by the State is motivated by and rooted in a legitimate and sincerely held religious belief; (2) whether the parties' free exercise of religion has been burdened and the extent of the impact on their religious practices; and (3) whether the State has a compelling interest in the regulation which justifies that burden. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-229 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-409 (1963); *Thomas v. Review Bd. of the Ind. Employment Security Div.*, 450 U.S. 707, 718-719 (1981). *State v. Shaver*, 294 N.W. 2d 883, 888-889 (N.D. 1980). See also Comment, Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education, 67 Ky. L.J. 415, 418-419 (1978-1979); Marcus, The Forum of Conscience: Applying Standards Under

the Free Exercise Clause, 1973 Duke L.J. 1217, 1242; Note, Public Regulation of Private Religious Schools, 37 Ohio St. L.J. 899, 902 (1976). A court must make this inquiry even if the activity is sponsored by a religious organization. "The Free Exercise Clause is no talisman, however, which automatically protects religious organizations from governmental regulation. The religious character of an organization does not provide a shield from regulation which in no way affects religious beliefs or acts." *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1081 (E.D.N.Y. 1978).

In this case, the judge was first required to determine whether the operation of the Grace Bible Church Christian School is motivated by a sincerely held religious belief. This threshold question is a question of fact. *State v. Whisner*, 47 Ohio St. 2d 181, 199 (1976). The plaintiffs concede that the operation of the Grace Bible Church Christian School is motivated by sincerely held beliefs. Thus, the judge went on to determine whether the statute unduly burdens the parties' right to the free exercise of their religion, and whether the State has a compelling interest which justifies burdening religious practice. These are issues of law. *Roloff Evangelistic Enterprises v. State*, 556 S.W. 2d 856, 858 (Tex. Civ. App. 1977).

We believe that the application of G.L. c.72, § 2, to the Grace Bible Church Christian School has only an incidental burden on the defendants' right to practice their religion.[8] See *United States v. Holmes*, 614 F. 2d 985,

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[8]In this case, we examine only the impact of the reporting requirement of G.L. c.72, § 2 on the right to the free exercise

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989 (5th Cir. 1980). Cf. *Hearde v. Commissioner of Internal Revenue*, 421 F. 2d 846 (9th Cir. 1970). See generally *Johnson v. Robison*, 415 U. S. 361, 383-386 (1974). The defendants and parents are free to teach the doctrines of their religion to the children who attend the Grace Bible Church Christian School; the children are free to learn those doctrines.[9] The defendants need only disclose the names, ages, and residences of the children so that the State may determine whether all children are in compliance with the compulsory attendance law.

Balanced against this burden is the State's traditional interest in the education of all its children. "The founders of the colony appreciated the importance and necessity of providing for universal education at a very early period." *Jenkins v. Andover*, 103 Mass. 94, 96-97 (1869). Our compulsory attendance law, G.L. c.76, § 1, demonstrates our continued belief in the importance of educa-

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of religion. Parents who send their children to nonapproved private schools run by religious organizations may be prosecuted under the compulsory attendance law. See G. L. c. 76, § 2. The application of the compulsory attendance law in those circumstances is not before us, and we intimate no view on its constitutionality.

[9]At the hearing on the plaintiffs' motion for summary judgment, the defendants claimed that G. L. c. 72, § 2, has a chilling effect on the exercise of their religion. The defendants asserted that once the school disclosed the children's names, the State would institute truancy prosecutions. See G. L. c. 76, § 2. Fearing prosecution, parents might be deterred from sending their children to the Grace Bible Church Christian School. We believe that this claim is best understood as arising under the right of freedom of association as guaranteed by the First Amendment. Cf. *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1082 (E. D. N. Y. 1978). See *infra*.

tion to our democratic society. "It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Because of the importance of education in our society, we believe that the State's need for the required information outweighs the incidental burden on the right of the defendants, parents, and children to practice their religion.

b. *Establishment clause.* The defendants do not dispute that the reporting requirement of G.L. c.72, § 2, applies to all private schools, both secular and religious. Thus, the defendants do not claim that the purpose of G.L. c.72, §, is to inhibit the operation of schools run under religious auspices. Instead, the defendants argue that, as applied to the Grace Bible Church Christian School, G.L. c.72, § 2, violates the establishment clause of the First Amendment because it inhibits religion and fosters an excessive government entanglement with religion. See *Surinach v. Pesquera de Busquets*, 604 F. 2d 73 (1st Cir. 1979).[10]

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[10]In *Surinach v. Pesquera de Busquets*, 604 F. 2d 73 (1st Cir. 1979), the court held unconstitutional the Puerto Rico Department of Consumer Affairs' investigation of the costs of operating private schools. The court concluded that the power of the secretary of the Department of Consumer Affairs "to 'regulate, fix, control, freeze and review . . . the schools' prices is 'a continuing [involvement] calling for official and continuing surveillance leading to an impermissible degree of entanglement.' *Walz v. Tax Commission*, 397 U.S. [664, 675 (1970)]."

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To determine whether the statute violates the establishment clause, the judge was required to apply the test set out by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman, supra* at 612-613, quoting *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 668 (1970). See *Larson v. Valente*, 50 U.S.L.W. 4411, 4417 (April 21, 1982). The application of G.L. c.72, § 2, to the Grace Bible Church Christian School has only an incidental effect on the right of the defendants, children, and parents to practice their religion. See (sic), *supra*. We, therefore, do not view the primary effect of G.L. c.72, § 2, as inhibiting religion.

Moreover, as applied to the Grace Bible Church Christian School, G.L. c.72, § 2, does not foster an excess-

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Id. at 78. Subjected to this power, the schools would be confronted with government perusal, public examination, and probably significant government involvement in their fiscal management. Moreover, the court saw no end to the government involvement in private religious schools. "[W]ith ceilings in place, the Commonwealth would have the ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities. . . . This governmental program thus has the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement. See *Lemon* v. *Kurtzman* [403 U. S. 602, 624 (1971)]." *Id.*

ive government entanglement with religion. "Where unconstitutional entanglement has been found, it has been in the government's continuing monitoring or potential for regulating the religious activity under scrutiny." *United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979).

The application of G.L. c.72, § 2, to the Grace Bible Church Christian School does not present such a danger. By requiring the supervisory officers to disclose the name, age, and residence of each child attending the school, the State does not seek to regulate or in any way become involved with the religious activities of the school or church. The Commonwealth is merely attempting to determine which children are attending school in compliance with the compulsory attendance law. Cf. *United States v. Freedom Church, supra.* We, therefore, conclude that the judge correctly determined as a matter of law that the application of G.L. c.72, § 2, to the Grace Bible Church Christian School does not violate the establishment clause of the First Amendment.

c. *Freedom of association.* The defendants contend that the disclosure required by G.L. c.72, § 2, will have a chilling effect on the willingness of parents to send their children to the school.[11] This chilling effect, the defendants assert, is proof that G.L. c.72, § 2, unconstitutionally

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[11]We think that the defendants have standing to raise the free association rights of the parents and children. See *NAACP v. Alabama*, 357 U. S. 449, 458-460 (1958).

burdens the right of the defendants, parents and children to freedom of association.[17]

To evaluate this claim, the judge first was required to determine whether the statute burdens the defendants', parents', or children's right to freedom of association. See *Bates v. Little Rock*, 361 U. S. 516, 523 (1960). *NAACP v. Alabama*, 357 U. S. 449, 462-463 (1958); *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1082 (E. D. N. Y. 1978). The right to freedom of association includes the right to belong to religious organizations. *NAACP v. Alabama*, supra at 460-461. In exercising this freedom, parents have the right to send their children to schools that promote their religious beliefs, and children have the right to attend those schools. Cf. *Runyon v. McCrary*, 427 U. S. 160, 176 (1976), citing *Meyer v. Nebraska*, 262 U. S. 390 (1923).

"A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands," would violate the right of freedom of association. *American Communications Ass'n. v. Douds*, 339 U. S. 382, 402 (1950). See *NAACP v. Alabama, supra* at 462. The right to freedom of association necessarily encompasses the right to "privacy in one's associations" including religious associations. *Id.* However, compelled disclosure of membership in religious organizations only violates the right

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[17]The "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U. S. 449, 460 (1958). Freedom of association is a limit on the power of State government. *Shelton v. Tucker*, 364 U. S. 479, 490 (1960). See L. Tribe, American Constitutional Law § 11-2 at 569 & n. 30 (1978).

of freedom of association if it brings adverse consequences on the members. See *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1083 (E. D. N. Y. 1978); *United States v. Freedom Church*, 613 F. 2d 316, 320 (1st Cir. 1979). Cf. *Buckley v. Valeo*, 424 U. S. 1, 69-70 (1976). Thus, the compelled disclosure of the names, ages, and residences of the children who attend the Grace Bible Church Christian School burdens the right to freedom of association only if it has adverse consequences for the children or parents.

It is undisputed that the required disclosure of the identity of the children attending the school does have adverse consequences. One parent whose son attends the school has been informed that his child is not in compliance with G.L. c.76, § 1. A parent whose child does not comply with the compulsory attendance law may be fined $20. G.L. c.76, § 2. For inducing a child to absent himself from school, a parent may be fined $200. G.L. c.76, § 4. As the State identifies the children attending the Grace Bible Church Christian School, it is reasonably likely that their parents may be threatened with truancy prosecutions. Thus, application of G.L. c.72, § 2, to the Grace Bible Church Christian School burdens the free association rights of the parents and children. Since the threat of truancy prosecutions may deter parents from sending their children to the Grace Bible Church Christian School, G.L. c.72, § 2, also burdens the defendants' right to freedom of association.

But finding this burden did not end the judge's inquiry. "Government may compel even those disclosures which directly burden [the right to freedom of association] in service of 'an interest in obtaining the disclosures

. . . which is sufficient to justify the deterrent effect' on [this right]. [*NAACP v. Alabama*, 357 U. S. 449, 463 (1958).] The governmental interest must be compelling and *there must be some substantial relation between that interest and the information sought.*" *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1083 (E. D. N. Y. 1978). *Buckley v. Valeo, supra* at 64-66. In this case, the judge correctly determined as a matter of law that the State's interest in compulsory education is so compelling and the information sought so relevant that it justifies the burden on the defendants', the parents', and the children's right to freedom of association. See (sic) *supra*.

d. *Privacy*. Additionally, the defendants claim that the application of G.L. c.72, § 2, to the Grace Bible Church Christian School violates the privacy rights of the defendants, the children, and the parents. The right to privacy protects three different interests. One is the interest in avoiding disclosures of personal matters and a second is the interest in independence in making certain kinds of important decisions. *Whalen v. Roe*, 429 U. S. 589, 599-600 (1977) (disclosure of the names of persons who purchase dangerous prescription drugs upheld). The third is "the right of the individual to be free in his private affairs from governmental surveillance and intrustion (sic)." *Id.* at 599 n.24. Since the defendants have not identified the specific privacy interest at issue in this case, the judge was required to determine whether G.L. c.72, § 2, as applied to the Grace Bible Church Christian School, unconstitutionally burdens any of these interests.

First, the judge had to examine whether G.L. c.72, § 2, unconstitutionally burdens the parents', children's, or de-

fendants' right to make certain independent decisions. These decisions deal with "matters relating to marriage, procreation, contraception, family relationships," *Paul v. Davis*, 424 U. S. 693, 713 (1976), see *Whalen v. Roe*, 429 U. S. 589, 600 (1977), and includes the parents' right to direct the upbringing of their children. See *Runyon v McCrary*, 427 U. S. 160, 178 n.15 (1976).

General Laws c.72, § 2, does not directly affect the parents' right to send their children to the Grace Bible Church Christian School or to attend the Grace Bible Church. Cf. *Plante v. Gonzalez*, 575 F. 2d 1119 (5th Cir. 1978), cert. denied, 439 U. S. 1129 (1979). It neither prohibits parents from enrolling their children in the Grace Bible Church Christian School nor interferes with the ability of children to obtain the religious education provided by the school. General Laws c.72, § 2, merely requires the supervisory officers of the school to report the name, age, and residence of every child who attends that school. It may be that the reporting requirement of G.L. c.72, § 2, deters a few parents from sending their children to the Grace Bible Church Christian School. However, we think that the judge correctly determined as a matter of law that this indirect effect is outweighed by the State's compelling interest in the compulsory attendance laws. Cf. *Walsh v. Louisiana High School Athletic Ass'n*, 616 F. 2d 152 (5th Cir. 1980), cert. denied, 449 U. S. 1124 (1981); *Cooper v. Oregon School Activities Ass'n.*, 52 Or. App. 425 (1981).[13]

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[13]The defendants claim that G. L. c. 72, § 2, violates the defendants' and parents' right to direct the education and up-

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Next, the judge was required to examine whether the application of G.L. c.72, § 2, violates the interest of the defendants, the parents, or the children in avoiding disclosures of certain personal matters. This branch of the privacy right is broader than the interest in making certain independent decisions. Matters falling outside the right to make independent decisions may still implicate the interest in nondisclosure or confidentiality. *Fadjo v. Coon*, 633 F. 2d 1172, 1176 (5th Cir. 1981). However, when the information sought involves the disclosure of organizational membership, a court should determine whether the disclosure violates the members' right to freedom of association. See *Plante v. Gonzalez*, 575 F. 2d 1119 (5th Cir. 1978). We have already determined that the judge correctly concluded that the disclosure requirement of G.L. c.72, § 2, does not violate the right of the defendants, parents, or children to freedom of association. See part 3c, *supra*.

Finally, the judge was required to determine whether the application of G.L. c.72, § 2, violates the right of the defendants, the parents, or children to be free from government surveillance and intrustion (sic). This right is protected by the Fourth Amendment's prohibition against unreasonable searches and seizures. *Whalen v. Roe*, 429 U. S. 589, 599 n.24 (1977). Except for limitations concerning breadth and relevancy, the Fourth Amendment does not ordinarily restrict an administrative requirement of reports. "The protection against unreasonable searches

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bringing of their children. The right to direct the education and upbringing of one's children is part of the privacy right. See *Runyon v. McCrary*, 427 U. S. 160 (1976). We have already determined that the judge correctly concluded as a matter of law that G. L. c. 72, § 2, does not violate this aspect of the privacy right of the parents or the defendants. See (sic) *supra*.

and seizures is satisfied if the inquiry is within the authority of the agency, the demand is not indefinite and the information sought is reasonably relevant to the administrative endeavor." *Colegio Puertorriqueno v. Pesquera de Busquets*, 464 F. Supp. 761, 766-767 (D. P. R. 1979). See *United States v. Morton Salt Co.*, 338 U. S. 632, 651-652 (1950). The disclosure required by G.L. c.72, § 2, is intended to aid the enforcement of the compulsory attendance law. G. L. c.76, § 1. The information sought is highly relevant to that purpose. We, therefore, conclude that the judge correctly determined as a matter of law that G.L. c.72, § 2, does not violate the right of the defendants, children, or parents to be free from unreasonable government intrusion and surveillance.[14]

Thus, we conclude that on the very narrow issue of the constitutionality of the reporting requirement, the judge properly granted the plaintiffs' motion for summary judgment. Nevertheless, we caution that where a party claims interference with religious freedom, a judge should rigorously examine the record to ensure that there are no genuine issues of material fact. A party asserting a violation of his First Amendment right to religious freedom must have a full and fair opportunity to present his claim. Since the only issues were issues of law, the defendants were not denied this opportunity.

Judgment affirmed.

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[14]The defendants also claim that G. L. c. 72, § 2, violates the Fourth Amendment's prohibition against unreasonable searches and seizures. We have already concluded that the judge correctly determined as a matter of law that G. L. c. 72, § 2, does not violate the Fourth Amendment right to be free from unreasonable government surveillance. For the reasons stated *supra* we conclude that G. L. c. 72, § 2, does not violate the Fourth Amendment rights of the defendants, children, or parents to be free from unreasonable searches and seizures.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
C.A. # 45660

FRANCIS X. BELLOTTI, ATTORNEY GENERAL and GREGORY R. ANRIG, COMMISSIONER OF EDUCATION,

Plaintiffs

V.

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL,

Defendants

MEMORANDUM AND ORDER
FOR JUDGMENT

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I. Introduction.

In the plaintiffs' complaint, they seek to obtain compliance by the defendants with the provisions of G.L. c.72, § 2. This statute requires supervisory officers of a private school to report the name, age and residence of each child of compulsory school attendance age attending the school to the superintendent of schools in the town where the child resides.

II. Facts and Procedural Status.

Reverend Robert W. Bailey is pastor and Reverend Steven M. Willett associate pastor of the Grace Bible Church. As an integral part of its ministry to its parishioners, the Church operates the Grace Bible Church Christian School in Dracut, Massachusetts (hereinafter "the School"). The School provides "full time instruc-

tion Monday through Friday to students in grades one through six". (Complaint and Answer at ¶9.) It is undisputed that there are children of compulsory school age attending the School (Complaint and Answer at ¶11) and that the School provides instruction in reading, writing, spelling, history, math, science, geography, language, poetry, art, physical education, phonics and Bible. (Complaint and Answer at ¶10.) Rev. Willett is "school administrator" of the School. (Complaint and Answer at ¶6.)

By letter dated October 7, 1980, the School Committee of the Town of Dracut asked Rev. Bailey to provide it with the names and addresses of students attending the School whose parents were then residents of Dracut. (Complaint and Answer at ¶12; Exhibit A of Plaintiffs' Exhibit B.) On November 13, 1980, the Attorney General's Office requested such information on behalf of the School Committee and the Department of Education. (Letter from Assistant Attorney General Lopez to Rev. Robert Bailey, Exhibit A of Plaintiffs' Exhibit C.) It is not disputed that defendants have failed to provide the information requested.

This case is before the court on plaintiffs' Motion for Summary Judgment. The court has heard oral argument and both plaintiffs and defendants have submitted memoranda. At oral argument, defendants opposed the Motion for Summary Judgment, arguing that the record was incomplete because the nature of defendants' individual religious beliefs had not been inquired into in a manner sufficient to show that they would not be burdened by compliance with the statute. Defendants also argued that the statutory scheme did not represent the

least restrictive alternative means of gathering information necessary to enforce the compulsory school attendance law; they suggested that public school transfer records would yield the same information with less burden upon defendants. Finally, defendants argued that the School was under the supervision of the Board of Elders, that defendants' duties and supervisory responsibilities had not been adequately proved, and that the School was neither public nor private, but religious, and was therefore beyond the reach of the statute.

III. Questions for Decision.

1. When a pastor and associate pastor of a church have supervisory duties in the management of an associated church school, are they "supervisory officers" within the meaning of the school attendance reporting statute, G.L. c.72, § 2?

2. Is a day school integrated into the ministry of a church a "private school" within the meaning of G.L. c.72, § 2?

3. Assuming that the defendant pastors and the school are subject to the requirements of G.L. c.72, § 2, is enforcement of the statute against them barred by any of the following constitutional protections:

(a) the free exercise clause of the First Amendment;

(b) the establishment clause of the First Amendment;

(c) the right to privacy under the Constitution of the United States;

(d) the right to freedom of association under the Constitution of the United States;

(e) the right to freedom from unreasonable search and seizure clause of the Fourth Amendment;

(f) the right to direct the education and upbringing of one's children under the First, Ninth and Fourteenth Amendments of the United States Constitution.

IV. Discussion.

This case represents an attempt by the Commonwealth to enforce the school attendance reporting statute against a fundamentalist church school, a school which provides a basic elementary education for certain children whose parents reside in Dracut. Under G.L. c.76, § 1.

> Every child between the minimum and maximum ages established for school attendance by the board of education . . . shall . . . attend a public day school in said town, or some other day school approved by the school committee during the number of days required by the board of education in each school year. . . .

[exceptions relating to certain employment omitted]. The enforcement mechanism for the compulsory school attendance law is aided by the reporting requirements of G.L. c.72, § 2, whereby the school committee of each town must compile a list of the names and ages of all minors residing in the town who are between the ages of five and sixteen. The school committee must also ascertain the number of students whose parents reside in the town and who are enrolled full-time in kindergarten through grade twelve in public and vocational

schools as well as "*nonpublic* schools". *Id.* (emphasis supplied). Supervisors of attendance are then to compare "the names of children enrolled in public and *private* schools" with those on the list of resident school-age children "and examine carefully into all cases where children of school age are not enrolled in, and attending school, [*sic*] as required by section one of chapter seventy-six". *Id.* (emphasis supplied). *See also* 603 CMR 19.03. Further,

> the supervisory officers of all *private* schools shall, within thirty days after the enrollment or registration of any child of compulsory school age, report his name, age and residence to the superintendent of schools of the town where the child resides; and whenever a child withdraws from a *private* school, such officers shall, within ten days, notify said superintendent.

Id. (emphasis supplied). Each superintendent of schools must also file an annual report with the commissioner of education containing the number of pupils whose parents or guardian reside in that town and who were enrolled full-time in several classes of school, including "nonpublic schools anywhere". G.L. c.72, § 2A, Seventh.

The questions before the court are both statutory and constitutional. The defendants first claim that they are not "supervisory officers" within the meaning of paragraph three of G.L. c.72, § 2, and that a suit against them is improper. Secondly, they argue that a religious day school such as theirs is not a "private school" within the meaning of the statute. Finally, defendants challenge the constitutionality of the statute as applied to them and contend that a full hearing on the merits is necessary to resolve the issue.

A. Defendants' Status as Supervisory Officers.

First, defendant Willett's status as a "supervisory officer" under G.L. c.72, § 2, cannot remain in dispute. In defendants' answer at ¶ 6, defendants admit that Rev. Willett is the "school administrator" of the Grace Bible Church Christian School. Although the affidavits before the court do not describe Rev. Willett's duties in any detail, the admission that he is the "school administrator", together with the fact that he is the "associate pastor" of the Grace Bible Church and that the ministry of the school is an "integral and inseparable" part of Grace Bible Church (affidavit of Rev. Willett at ¶ 5) and "an educational activity or ministry of Grace Bible Church" (*Id.* at ¶ 6), lead to the conclusion that Rev. Willett is precisely the sort of "supervisory officer" contemplated by the statute. As administrative head of the School, it is reasonable to assume, in the absence of affidavits to the contrary, that he would have access to the register of pupils and could request or direct that a list of those pupils be prepared.

Defendants argue that a sufficient showing has not been made as to defendant Willett's actual duties at the School, that the School is "under the supervision of the Board of Elders of the Church" (Defendants' Memorandum at ¶ 5, page 3; Affidavit of Robert W. Bailey, Defendants' Exhibit A-1 at ¶ 1) and that plaintiffs have made no showing that defendants could furnish the names of Dracut residents attending the School without the approval of the Board of Elders. Defendants pose a hypothetical situation in which the court would order defendants to produce a list of such students and the Board of Elders would refuse to allow defendants to comply.

Defendants mistake the nature of plaintiffs' burden, however, and neglect their own.

First, defendants' affidavits do not adequately present the issue of whether they are or are not "supervisory officers" within the meaning of the statute. A party may not resist a motion for summary judgment by

> rest[ing] upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Mass. R. Civ. P. 56(e). In addition, Mass. R. Civ. P. 56(f) provides the procedure to be followed when "it appear[s] from the affidavits of a party opposing the motion that he *cannot for reasons stated* present by affidavit facts essential to justify his opposition". In the instant case, defendants have not raised their lack of authority by affidavit;[1] rather, they have chosen to rely upon the hypothesis presented by counsel at oral argument. Since the plaintiffs have made a showing of de-

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[1]Defendants' sole attempt of raising the issue by affidavit was the use of a brochure describing the School, the author and audience of which were unstated. Affidavit of Robert W. Bailey, Defendants' Exhibit A at ¶ 6 and A-1. This brochure described the School as being "under the supervision of the Board of Elders". The phrase is susceptible of a number of possible readings implying anything from general doctrinal supervision to day-to-day administration. In the former case, if the Board had no administrative responsibilities, the Board would not be the "supervisory officers" contemplated by the reporting statute. Defendant presents no affirmative evidence other than the conclusory statement of this brochure to indicate that the Board of Elders has any supervisory authority over the School at all, much less to show that it is the appropriate party to which the c. 72 request should be addressed.

fendant Willett's supervisory authority through the admissions contained in defendants' answer and affidavits, defendants have the burden of going forward to show that facts exist which would warrant their opposition to the motion. *See* Reporters' Notes to Mass. R. Civ. P. 56(e). By declining to attest to the existence of facts showing that defendants are not proper parties, defendants admit those facts for purposes of argument on the motion and choose to rely solely on legal argument in contesting the motion. *Id.* In the case at bar, plaintiffs have made the showing that the "school administrator" is a "supervisory officer" for purposes of the statute and that Reverend Bailey is pastor of the church of which the School is an "integral and inseparable" part. Absent the allegation of facts tending to show the contrary, plaintiffs must prevail.

Secondly, it should be noted that the proper vehicle for defendants' contention is a motion to dismiss. Mass. R. Civ. P. 21 provides for dismissal as to any defendant who is misjoined. Defendants do not appear to contend that necessary parties—the members of the Board of Elders, for example—are not before the court and that the procedures of Mass. R. Civ. P. 19 should be invoked. Even were such contentions raised by affidavit and by a motion to dismiss, they would not be conclusive; rather, plaintiffs would be allowed to amend their complaint and substitute the proper party or parties. The knowledge of who would be best able to comply with the statutory reporting requirement is peculiarly within defendants' control. Placing a burden of going forward upon defendants with re-

gard to this issue is, therefore, logical and just.[2] Given the present state of the affidavits, the court could not grant a motion to dismiss or a motion to join the Board of Elders even were such motions properly before it.

Finally, one might point to a more general policy reason for not placing the burden of discovery and allegation on the plaintiff on such an issue. If the Commonwealth or a school committee had the burden of identifying the person or persons with ultimate authority to order compliance with the statute, the Commonwealth or the committee would have to make intrusive inquiries into the administrative and doctrinal structure of a ministry which defendants themselves allege to be an "integral and inseparable" part of their church. *See, e. g.*, Affidavit of Robert W. Bailey, Defendants' Exhibit A at ¶ 5. Clearly, the Church School itself should decide which of its "supervisors" would be the proper party to respond to plaintiffs' request, were such a response held to be legally required. The burden should, therefore, be upon the defendants to produce facts sufficient to show that they alone are not the proper parties to respond to plaintiffs' request under the reporting statute.

B. The "Private School" Issue.

There is no definition of the term "private school" in G.L. c.72 or G.L. c.76, the school registers and school at-

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[2]Defendants do not appear to claim that their religion forbids them from providing the necessary information to the court. While they have contended that seeking certification for their school would violate their beliefs, they have participated in defending the court action against them.

tendance statutes, respectively.[3] The language of the relevant provisions, however, together with the purpose of the statutory scheme, dictates that the term "private school" in the third paragraph of G.L. c.72, § 2 refers to any nonpublic school the purpose of which is to provide basic education for its students.

First, as G.L. c.76, §1 and c.72, §2 show, the purpose of the statutory scheme is to provide for the basic education of the Commonwealth's children through the means of a compulsory attendance law. That law is to be enforced by the local school committees and by the Department of Education through reporting requirements set out in the statute and in the regulations of the Department of Education, 603 CMR 19.00, *et seq.* By comparing the town's census of school-age children to the lists of children who are actually attending school, the local school committee and the Department of Education are able to ascertain whether any resident children are truant and take appropriate action. G.L. c.72, §§ 2 and 2A; 603 CMR 19.03. Since the school committees have direct access to attendance lists from the public schools only, attendance lists from nonpublic schools must be provided by those institutions themselves. If the local school committee were unable to obtain attendance lists from nonpublic schools, it would have no alternative but to regard all students in those institutions as truants until proven otherwise. The purpose of

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[3] In its Memorandum, at 4, the Commonwealth cites several sections of G. L. c. 15 and G. L. c. 71 for the proposition that the term "private school" is used to distinguish nonpublic schools. The sections cited contain the term "private school" in contradistinction to that of "public school", but neither term is explicitly defined and the distinctions presented are not sufficient to construct an implicit definition.

the statute is to identify those children of school age not attending any school at all, not those children who are *either* truant *or* attenders of church schools. To construe the statute's reporting requirements to apply only to secular day schools would produce such an anomalous result.

Secondly, it is clear from the language of G.L. c.72, § 2 that the term "private schools" in the third paragraph was merely an alternative way of referring to "nonpublic schools", including parochial and church schools. The second sentence of § 2 reads

> [t]he school committee of each town shall also ascertain the number of pupils . . . who are enrolled for full-time attendance, in kindergarten and grades up to and including grade twelve, in public and vocational schools and classes in the commonwealth and nonpublic schools anywhere.

In sentences six through eight of § 2 the term "private" is used instead of "nonpublic", but it is clear that the two terms are synonymous:

> [t]he annual school committee report shall set forth the number of children . . . together with *the number attending public or private schools, and the number not attending school*, in any given year.

(emphasis supplied) G.L. c.72, ¶ (sic) 1 (sentence 7). By this provision, the Legislature intended the school committee to assign *all* children under its jurisdiction to one of the three classes of school attendance which were regarded, together, as exhausting the possibilities for school attendance status. In this context, and in the third paragraph of § 2, "private" clearly means "nonpublic". The language of G.L. c.72, § 2A, which describes the annual reports of superintendents of schools, also uses the term "nonpublic"

to refer to "private schools". *See* G.L. c.72, § 2A, cl. Seventh.

In addition, reference to G.L. c.76, § 1 shows that the Legislature did not intend that parochial or church schools which provide basic education be excluded from the reach of that chapter, including the compulsory education provisions. Indeed, the tenor of G.L. c.76, § 1 is to affirm the fact that religious schools may provide an alternative for parents who wish to educate their children outside of the public schools. Thus, the first paragraph of § 1 authorizes local school committees to approve a "private school" for purposes of the compulsory attendance statute and forbids those committees from "withhold[ing] such approval on account of religious teaching". Further, the second paragraph of G.L. c. 76, § 1 states that

> [p]upils who, *in the fulfillment of the compulsory attendance requirements* of this section, attend private schools . . . so approved . . . shall not be denied [their rights to transportation] *because their attendance is in a school which is conducted under religious auspices or includes religious instruction*. . . .

(emphasis supplied). Clearly, in the context of G.L. c.76, § 1, the term "private school" includes church schools and is not to be restricted to secular private schools.

That the Grace Bible Church Christian School is a nonpublic, or "private", school is clear from the definitions of those two classes of schools contained in *Jenkins v. Andover*, 103 Mass. 94 (1869), and from the definition of a "school" contained in *City of Chicopee v. Jakubowski*, 348 Mass. 230 (1964). A "school" is "a place for systematic instruction in any branch or branches of knowledge." *Chicopee, supra*, at 232. Since the Grace Bible Church School

gives instruction in secular as well as religious subjects, through a graded, formal curriculum during the usual school hours, *see* Affidavit of Robert W. Bailey, Defendants' Exhibits A and A-1, there is no doubt that the School meets the normative definition. Recourse to *Jenkins, supra,* at 98-100, illustrates that the School is not a "public" school, one supported by a town or towns or by the Commonwealth and open and free to all the children of the town in which they are located; but rather that the School is a "private" school, one which is supported and managed by individuals.

For these reasons, the school attendance reporting statute, G.L. c.72, § 2, is construed so as to include the Grace Bible Church Christian School within the category "private schools".

V. Conclusion.

Upon consideration of the complaint, defendants' answer and the admissions therein, affidavits, memoranda and oral argument of the parties, it is my considered judgment that there is no genuine issue as to any material fact and the plaintiffs as the moving parties are entitled to a judgment as a matter of law.

The position of the defendants in contesting the constitutionality of the statutes and regulations referred to *supra* is without merit as stated previously herein. I rule that the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the defendants may have in refusing to disclose the information requested.

ORDER

It is ORDERED that the Motion for Summary Judgment be and is hereby allowed.

/s/ Wilfred J. Paquet
Justice of the Superior Court
Department

Dated: July 7, 1981

APPENDIX C

A True Copy of Judgment Duly Entered on July 7, 1981

bc

N.B. FOR CLERK'S USE ONLY

**Judgment Entered on Docket July 7, 1981
Pursuant to Mass R. Civ. P. 56(a) and notice sent
to parties pursuant to Mass. R. Civ. P. 77 (d)
as follows:**

• • •

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 45660

/s/ Francis X. Bellotti, Atty. Gen. et al., Plaintiff(s)

v.

/s/ Robert W. Bailey, et al., Defendant(s)

JUDGMENT
(SUMMARY)
(PURSUANT TO MASS. R. CIV. P. 56)

This action came on to be heard before the Court, Paquet, J., presiding, upon motion of the *Plaintiff(s) for Summary Judgment pursuant to Mass. R. Civ. P. 56—the parties having been heard—and the Court having considered the *Pleadings—Depositions—Answers to Interrogatories—Admissions—and Affidavits, finds there is no genuine issue as to material fact and that the *Plaintiff's is entitled to a Judgment as a matter of law, It Is Ordered and Adjudged That: Plaintiff prays for relief under (a) and (b) of the Complaint are hereby granted.

Dated at Boston, Massachusetts, this 7th day of July, 1981.

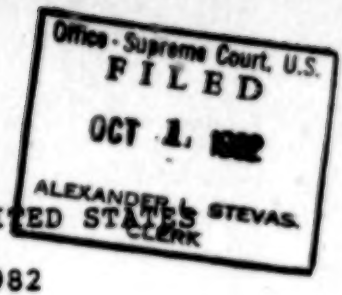
Form of Judgment Approved:

/s/ Wilfred J. Paquet
Justice of the Superior Court

Michael Joseph Donovan,
Clerk of Court

By /s/ James P. Kelly
Assistant Clerk

*Strike inapplicable words.
Form Civ. P. 45A (Rev.) 1-77 500



No. 82-390

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL,

Petitioners,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL AND GREGORY R. ANRIG, COMMISSIONER OF EDUCATION,

Respondents.

On PETITION FOR A WRIT OF CERTIORARI To the Supreme Judicial Court for the Commonwealth of Massachusetts

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. WHETHER THE MASSACHUSETTS SUPREME JUDICIAL COURT APPLIED THE CORRECT CONSTITUTIONAL TESTS IN IT'S ANALYSIS OF PETITIONERS' FREE EXCERCISE AND ASSOCIATIONAL CLAIMS

B. WHETHER THE MASSACHUSETTS SUPREME JUDICIAL COURT CORRECTLY AFFIRMED THE GRANTING OF SUMMARY JUDGMENT ON THE CONSTITUTIONAL CLAIMS IN THIS CASE

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STATEMENT OF THE CASE

a) Nature of Proceedings

This is a petition for a writ of certiorari to review a decision of the Massachusetts Supreme Judicial Court, finding that the state's interest in the education of its children justifies the incidental burden that the private school reporting provisions of G.L. c.72, §2 have on petitioners' free exercise of religion and associational rights, and upholding the granting of summary judgment for respondent.[1/]

b) Statement of Facts

Since September, 1980, the Grace Bible Church (Church) has operated

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1/ The relevant statutory and constitutional provisions are reproduced at pp. 2-4 of the Petition for a Writ of Certiorari.

the Grace Bible Church Christian School (School), at 517 Methuen Street, Dracut, Massachusetts. Petitioner Bailey is pastor of the Church and petitioner Willett is associate pastor of the Church and administrator of the School. The School provides full-time instruction to children of compulsory school age in grades one through six.

The School was requested to provide the name, age and residence of every child of compulsory school age in attendance, as required by G.L. c.72, §2, by the School Committee of Dracut by letter dated October 7, 1980, and again by the Department of the Attorney General by letter dated November 13, 1980. In both instances the School refused to comply.

As a result, the Attorney General and the Commissioner of Education filed a complaint in Suffolk County Superior Court, seeking declaratory and injunctive relief to obtain petitioners' compliance with the reporting provisions of G.L. c.72, §2. Petitioners filed an answer claiming, among other things, that application of G.L. C.72, §2 violated the First Amendment rights of religion and freedom of association of the petitioners, parents and children attending the School. On the basis of the pleadings and affidavits submitted, respondents moved for summary judgment.

Respondents' affidavits asserted that the School was not approved as a school at which attendance satisfied compulsory school laws (Affidavit of Paul Lemiere), that letters requesting

the attendance information required by G.L. c.72, §2 had been sent to petitioners (Affidavits of John Sullivan and Maria Lopez) and that the School had never provided the requested information (Affidavit of Christos Daoulos).

At the hearing on the motion petitioners submitted affidavits from Reverend Bailey, Reverend Willett and Andre Paquette, Sr., in opposition. On the pertinent constitutional issues, petitioners Bailey and Willett made the same assertions:

> "Among the ministries of Grace Bible Church is the Grace Bible Church Christian School . . ."
>
> ". . . To provide their children with a non-christian education is believed to be a sin against the dictates of the believers' faith . . ."
>
> "The Grace Bible Church Christian School operates totally as an integral part of the church . . ."

"As a ministry of the church, Grace Bible Church Christian School is constitutionally exempt from any requirements of prior consent of civil government as a pre-condition to its operation . . ."

Respondents conceded that the operation of the School was motivated by sincerely held religious belief. There was no assertion that secrecy in name, age, and residence is a religious belief or that reporting information to secular authorities per se violated a religious belief.

Andre Paquett's affidavit merely asserted that by letter of November 26, 1980, the attorney for the Dracut School Committee informed him that in attending the Grace Bible Church Christian School his son was not in compliance with the compulsory school laws. This was uncontroverted.

On July 7, 1981, deciding that there were no disputed issues of material fact, the Superior Court issued a Memorandum and Order for Judgment granting summary judgment for respondents. The Superior Court concluded that petitioners' constitutional defenses were "without merit" and that "the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the defendants may have in refusing to disclose the information requested." (App. 34). Petitioners requested the lower court to stay the Judgment and Order of July 7, 1981. After a hearing on July 21, 1981, the Superior Court denied petitioners' request. Petitioners filed a Notice of Appeal on August 6, 1981. The

Massachusetts Supreme Judicial Court granted the respondents' application for direct appellate review.

In their brief to and at oral argument before the Supreme Judicial Court petitioners requested the Court to find error in the Superior Court's order for failure to require the Commonwealth to show that no less restrictive alternative to the requirements of G.L. c.72, §2 existed. Petitioners suggested that the parents themselves should provide the information required by G.L. c.72, §2, or that the state should obtain the required information without enforcing the requirements of G.L. c.72, §2.

The Supreme Judicial Court rendered its opinion on June 2, 1982, affirming the Superior Court's order.

ARGUMENT

I. CERTIORARI IS NOT APPROPRIATE TO REVIEW THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT BECAUSE THE DECISION IS CORRECT, AND THERE IS NO CONFLICT IN THE DECISIONS OF THIS COURT AS TO THE TESTS APPLICABLE TO ANALYZE THE CONSTITUTIONAL QUESTIONS IN THIS CASE.

Petitioners argue that the Supreme Judicial Court erred in failing to require the state to demonstrate a "less drastic means" for attaining its ends, and that this Court should hear this case to clarify the standards to be used in analyzing First Amendment claims. Respondents contend that the Court below analyzed petitioners' claims of associational rights and free exercise in accordance with well-established principles.

A. Freedom of Association

The Supreme Judicial Court found that disclosure of the information sought by G.L. c.72, §2 could have adverse consequences on the associational rights of petitioners, parents, and children because the threat of truancy prosecution may deter parents from sending their children to the School, but that the state's interest in compulsory education is so compelling and the information sought so relevant that it justifies the burden. (App. 17-18).

It should be noted that this burden is not caused by the reporting requirements. There was no allegation that disclosure of the information would subject anyone associated with the School to harrassment. Thus, the

Supreme Judicial Court properly found that disclosure pursuant to G.L. c.72, §2 does not directly interfere with associational freedoms. Cf. Bates v. Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). The information required to be divulged by G.L. c.72, §2--name, age and residence--is not of a sensitive political or personal nature. It is information that is disclosed numerous times in an individual's life. Indeed, this Court has found that reporting school attendance is "ministerial and lacking ideological content or use." Committee For Public Education And Religious Liberty, v. Regan, 444 U.S. 646, 656 (1980).

The burden is caused by the threat that the state will enforce its truancy

laws once the names are obtained. That threat exists only because of the school's non-approved status.[2/] Consequently, the burden arises by operation of law. Any question as to the constitutionality of the compulsory school laws, or the constitutionality of applying them to these petitioners, is premature.

In Buckley v. Valeo, 424 U.S. 1, 66 (1975), this Court acknowledged that "there are governmental interests sufficiently important to outweigh the possibility of infringement" on First Amendment Rights. Where compelled disclosure requirements are involved, this Court has required that "there be a 'relevant correlation' or 'substantial

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2/ G.L. c.76,§1 requires children of compulsory school age to attend a public school or an approved private school.

relation' between the governmental interest and the information required to be disclosed". Id. at 64 and cases cited.

The purpose of G.L. c.72, §2 is to facilitate administration and enforcement of the state's compulsory school laws. In a long line of decisions this Court has recognized the importance of the State's interest in the education of its children. Brown v. Board of Education, 347 U.S. 483, 493 (1954); Cochran v. Board of Education, 281 U.S. 370, 375 (1930); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Myer v. Nebraska, 262 U.S. 390, 402 (1923). The information required disclosed is essential to accomplish the comparison of names required by G.L. c.72, §2, ¶1, which allows local

officials to ascertain what children are not attending school as required by law. Thus, it meets the relevancy test articulated by this Court in Buckley v. Valeo.

Petitioners claim that the Supreme Judicial Court erred because it did not require the state to prove the absence of less drastic means for fulfilling its purpose under G.L. c.72, §2. Petitioners rely on Shelton v. Tucker, 364 U.S. 479 (1960). This case differs from Shelton. In Shelton this Court struck down an Arkansas statute requiring teachers, as a condition of employment in state schools, to disclose every organization to which they belonged or contributed in the preceding five years, finding that "[t]he statute's comprehensive interference

with associational freedom goes far beyond what might be justified in the exercise of the state's legitimate inquiry into the fitness and competency of its teachers". Id. at 490. The disclosure requirements in this case do not directly or unduly interfere with associational freedom, and the information requested is not broader than the state interest to be served by it.

The Supreme Judicial Court was not required to consider whether the state had alternative means for obtaining the information, because the adverse consequences on associational rights are not caused by the disclosure requirements. Clearly, the Court was not required to consider whether the state had proven the absence of

alternative means. Such proof has never been required by this Court. Where this Court has considered whether alternative means exist, it has reached its conclusion logically. Cf., United Staes v. Lee, __U.S. __, 102 S. Ct. 1051, 71 L.Ed.2d 127 (1982). Even if a finding as to alternative means were required, less restrictive alternatives to the reporting requirements do not exist.

Petitioners suggest that requiring the parents to provide the information is a less restrictive means. That alternative does not remove the threat of prosecution constituting the burden on associational rights.

Petitioners' other suggestion is that the state should assume that every

child not appearing on an approved school list is a truant. This alternative would require the state to more closely scrutinize the activities of individuals, making more inquiries from more sources about the status of more children. Thus, this suggestion would not be less restrictive than the current procedures. In addition, the administration of such procedures would be unduly burdensome for the state and the individuals involved. Moreover, the ultimate impact on associational rights would be the same.

The petitioners' suggestions of "less restrictive alternatives" are really ways to reduce the minimal administrative burden the statute imposes on them as supervisory school officials. There is no way alter the

incidental impact which state identification of children who attend unapproved schools may have on associational rights. The threat of truancy prosecution will exist regardless of how the state obtains the information. Thus, discussion of alternatives is superfluous and futile.

B. Free Exercise Of Religion

The Supreme Judicial Court found that application of G.L. c.72, §2 only has an incidental burden on petitioners' right to free exercise, and that, because of the importance of education, the state's need for the information outweighed this burden. (App. 11, 13). It should be noted that the impact is on the operation of the School and not on religious belief. The Court found that G.L. c.72, §2 is a law that regulates

conduct. (App. 10). The burden is the deterrent effect on the operation of the School caused by the threat of truancy prosecution. That threat is made real by the School's non-approved status and not by the mere requirement that the names of compulsory school age children be reported.

Petitioners contend that the disclosure requirements do directly interfere with free exercise because they impose an obligation on church pastors. However, they cite to no belief that prohibits disclosure of identity to civil government. Cf. United States v. Lee, supra. The interference they allege is with the "Church's religious autonomy" (App. 12) not belief. This contention is without merit. There is no interference with

the Church's religious autonomy. The reporting requirements are directed to the supervisory officers of private schools, both religious and secular. In this case the School is operated by a church, and the supervisory officers of the School are the pastors of the church. These coincidences, however, do not change the scope and purpose of the statute. The statute in no way seeks to regulate matters of belief or religious practice. It is a neutral statute with a secular purpose.

In a long line of cases this Court has recognized that activities of individuals, even when religiously based, are subject to regulation by the state in the exercise of their undoubted power to promote the health, safety, and general welfare. Wisconsin v. Yoder,

406 U.S. 205, 220 (1972) and cases cited. Where a regulation is neutral, an undue burden on the free exercise of religion must be shown. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 717 (1981) and cases cited. Where state requirements impinge on religious liberty, this Court has required the state to show a sufficiently compelling interest to justify the burden on First Amendment rights. Yoder, supra., at 214.

Petitioners contend that the Supreme Judicial Court erred in not requiring the state to prove that no less restrictive means for accomplishing its purpose exist. However, the Court was not required to reach this level of analysis because it did not find that

G.L. c.72, §2 imposed an undue burden on petitioners' free exercise of religion. Only an incidental burden was found. This finding is correct. The statute does not directly interfere with religious belief. Petitioners, parents and children are free to maintain their beliefs and to teach and learn the doctrines of their religion. It is the threat of truancy prosecution that burdens the operation of the school. That threat exists for reasons unconnected to the reporting requirements. To the extent that reporting is a nexus towards truancy prosecution, it is an incidental one.

Moreover, petitioners misapprehend the holdings in Sherbert v. Verner, 374 U.S. 398 (1963), Wisconsin v. Yoder, supra., and Thomas v. Review Board of

Indiana Employment Security, supra. Resolution of those cases did not turn on whether the state had less drastic means available. In those cases this Court invalidated state requirements as applied to the petitioners, because the state interests to be served by the requirements were not sufficiently compelling to justify the burden on religious freedom.

Assuming, arguendo, that consideration of alternatives to reporting under G.L. c.72, §2 is pertinent, as shown above, less drastic means do not exist. The burden caused by the threat of truancy prosecution arises by operation of law because of the School's non-approved status and not from the disclosure requirements. This burden cannot be eliminated or

minimized. It will exist regardless of how the state obtains the attendance information.

Contrary to petitioners' assertion, the case of U.S. v. Lee, supra., does not present a change in the standards previously articulated by this Court for analysis of free exercise claims. In that case an Amish employer sought an exemption from payment of social security taxes for his employees on First Amendment religious grounds. This Court found that the governmental interest in the social security system outweighed the petitioners' claim of infringement, and that accommodation of the religious interest would unduly interfere with fulfillment of the governmental interest. In numerous prior decisions this Court has upheld

state requirements which burden religious exercise where the state interest to be served justifies the burden. Braunfield v. Brown, 366 U.S. 599 (1961) (Sunday closing laws); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination laws); Reynolds v. United States, 98 U.S. 145 (1878) (polygamy law). Here, as in those cases, the state's interest in compulsory education justifies the incidental burden on religious exercise.

II. CERTIORARI IS NOT APPROPRIATE TO REVIEW THE SUPREME JUDICIAL COURT DECISION AFFIRMING SUMMARY JUDGMENT, BECAUSE THE DECISION IS CORRECT AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Summary judgment is appropriate where the pleadings and affidavits "show that there in no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". Mass. R. of Civ. P. 56(c). The Massachusetts summary judgment rule is the same as the federal rule.

Petitioners assert that the state courts resolved questions of material fact and questions concerning the truth or falsity of religious belief. This assertion is without grounds. All of petitioners' factual assertions were accepted as true; respondents conceded, and the lower courts found, that "the

operation of the Grace Bible Church Christian School is motivated by sincerely held religious belief." (App. 11). It is significant that the Supreme Judicial Court found that G.L. c.72, §2 burdened petitioners' First Amendment rights. Although petitioners assert that the record is replete with instances where the court resolved questions of fact and belief, the only example they cite is the failure of the Commonwealth to introduce proof as to the absence of less restrictive means. That is not an example where a question of fact or belief was resolved. That example involves questions of legal standards and legal conclusions properly decided on a motion for summary judgment.

Petitioners' other contention is that summary judgment is inappropriate where bona fide constitutional claims exist. That assertion is unsupported by law. Summary judgment is appropriate in all civil cases. Mass. R. of Civ. P. 56 (a). The summary judgment procedure is the proper vehicle for disposing of constitutional questions where an adequate factual record has been presented. See Roe v. Wade, 410 U.S. 113 (1973), Graham v. Richardson, 403 U.S. 365 (1971), 6 Moore's Federal Practice ¶56.17 [10], at 56-772-76 (2d.ed. 1976).

Kennedy v. Silas Co., 334.U.S. 249 (1948) does not assist petitioners in their claim that summary judgment was improper here. In that case this Court vacated a grant of summary judgment

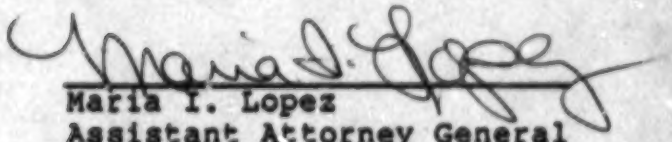
because of an inadequate record and because legal contentions presented had not been made before. The record here is adequate. Petitioners have presented all their legal theories and factual allegations to support those theories in their answer and affidavits opposing the motion for summary judgment. It should be noted that petitioners have never requested an opportunity to present additional facts in support of their claims. The facts upon which petitioners rely are all in the record. Moreover, alternatives to the reporting requirements were not absent from the lower courts' considerations. Petitioners themselves suggested alternatives to the requirements of G.L. c.72, §2.

Similarly, Perry v. Linderman, 408 U.S. 593 (1972) does not assist petitioners' claim here. In that case this Court found the existence of a genuine dispute concerning the reason for refusal to renew a teacher's employment contract. Id. at 598. There are no factual disputes in this case. The matters petitioners dispute concern constitutional standards. Those are issues of law. And, as shown above, the Supreme Judicial Court applied well-established constitutional standards in its analysis of the claims here.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be denied.

Respectfully submitted,



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